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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1337 102

RAYMOND J. GRACE, Trading under the name and style of R. J. & M. C. Grace, *Petitioner*,

v.

M. HAMPTON MAGRUDER, Collector of Internal Revenue, *Respondent*.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

LOWRY N. COE,
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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioner, Raymond J. Grace, trading under the name of R. J. & M. C. Grace, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above entitled cause on March 19, 1945. (R. 68)

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

Petitioner sued Magruder, Collector of Internal Revenue, to recover certain taxes assessed against and paid by him under the Social Security Act.

The tax in dispute under Title VIII of said Act amounted to $194.56, representing the supposed employers' and employees' shares and interest, covering the period from September 1, 1937 to September 30, 1941. The tax under Title IX totaled $397.34, including 25 per cent penalty and interest, covering the calendar years 1936 to 1940 inclusive.

The major portion of these assessments was levied by the Commissioner of Internal Revenue upon his theory that certain men (commonly called coal hustlers) who carried coal sold by the petitioner, from the street where it was dumped, to the customer's bin, for fixed charges of 75 cents per ton of coal stored, were employees of the petitioner, and that storage charges collected by petitioner from the consumer and transmitted to the hustler were payments of wages under the Act.

The assessments also applied to moneys paid to a watchman at a railroad yard and payments for extra labor. The legality of the assessments respecting these two types of workers is considered unimportant to petitioner and this petition is filed primarily respecting the assessments made on account of the coal hustlers.

The principal issue therefore is whether or not coal hustlers are employees of the petitioner within the meaning of the Social Security Act and whether or not the small payments for storage by the ton constituted payments of wages under the Act.

Petitioner contends that the hustlers are not employees and that storage charges collected by petitioner from the consumer and transmitted to the hustlers do not constitute payments of wages under said Act; and that it was not the intention of Congress to have these men embraced within the provisions of the Act; that therefore the taxes assessed

and paid were improperly and illegally assessed and collected, and petitioner is entitled to recover the same.

The case went to trial before the District Court of the United States for the District of Columbia upon a stipulation of facts and evidence. Most of the fact are included in the Court's findings of fact (R. 56). The details of the relationship existing between the petitioner and the coal hustlers are set forth in paragraph 8 of the findings of fact (R. 58).

The Trial Justice concluded under a liberal construction of the Act (R. 45) that the persons described were employees of the petitioner and engaged in his employment within the meaning of the applicable provisions of the said Act, and that payments made by petitioner to said persons were payments of wages within the meaning of said Act. (R. 62).

The United States Court of Appeals for the District of Columbia affirmed said opinion on March 19, 1945.

Chapter 9 of the Act (Employee's tax) imposes

> "upon the income of every individual a tax equal to the following percentages of wages * * * with respect to employment * * *:
>
> (1) With respect to wages received during the calendar years * * *."

and further provides that the tax

> "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." (App. 15)

And in addition to the employee's tax, the Act provides:

> "Every employer shall pay an excise tax with respect to having individuals in his employ, equal to the following percentages of the wages * * * paid by him * * * with respect to employment * * *. (App. 15)

The Act further provides:

> "The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *"

and provides (Section 1426 b):

> "The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him. * * * (App. 16)

The Act provides also, (Section 1429):

> "The Commissioner with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter."

Pursuant thereto the Commissioner by his Regulations defined employees as covered by said Act (App. 18-20), the Regulations providing generally that if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee, and an individual performing services as an independent contractor is not as to such services an employee. (App. 20)

It is contended by the petitioner that no relationship of employer and employee exists between him and the coal hustlers, and that the storage charges paid the hustlers and collected from the consumers do not constitute the payment of wages within the meaning of the Act; that the Regulations adopted by the Commissioner, with the approval of the Secretary, have the force and effect of law; that the relationship between the petitioner and the hustlers does not bring them within the Act nor does it constitute the relationship of employer and employee under the law.

It is likewise contended that Congress did not intend that men of the type involved here be covered by the Act. The Act specifically excludes from its operation a large number of classes of labor in actual employment, including domestic labor in private homes (which would include persons within a similar social class), agricultural labor, casual labor not

in the course of the employer's trade or business, services performed by members of crews of vessels, services performed by persons in the employ of son or daughter, or performed by person in employ of a spouse or by a minor in employ of a parent, services performed for non-profitable institutions of a religious, charitable, literary or educational purpose or for prevention of cruelty to children or animals (Act Section 1426 b-h). The Circuit Court of Appeals in the case of *Glenn* v. *Beard*, 141 Fed. (2) 376, stated:

> "However, almost half of all the persons gainfully occupied in the United States are excluded by Congress from the benefits of the statute. Senate Report No. 628, 74th Congress, 1st Session, page 9."

The exclusion by Congress of a large percentage of persons actually in the legal status of employees, shows that Congress intentionally excluded certain types of labor, so that it may well be presumed that Congress in making the Act apply to employers with respect to have individuals in his employ and basing the tax levied upon wages paid, did not intend to include the type of jobbers involved here.

Three decisions of the Circuit Court of Appeals dealing with the relationship of employer and employee under the Social Security Act have been rendered, two by the 4th Circuit Court of Appeals and one by the 6th Circuit Court of Appeals.

The most recent decision of the 4th Circuit is directly in conflict with the decision of the 6th Circuit on the issue of what constitutes the relationship of employer and employee under the Social Security Act.

The case of *Magruder, Collector*, v. *Yellow Cab Company of D. C., Inc.*, in the 4th Circuit, 141 Fed. (2) 324, involved the question as to whether or not taxicab drivers who operated cabs of the Yellow Cab Company in the District of Columbia under a lease agreement were employees. The elaborate and well written opinion of Judge Chestnut of the District Court in Baltimore (49 Fed. Supp. 605) was af-

firmed. The Circuit Court of Appeals in affirming said opinion discussed the question further, in view of the importance of the question. Both the opinion of Judge Chestnut and the Circuit Court of Appeals upheld the view of the law taken by the petitioner in this case. Petitioner does not contend that there is any similarity between the relationship existing between the laborers in this case and the taxicab company and its drivers, but relied on the *Yellow Cab* case because the very elaborate statements of law contained within the opinions in that case amply supported the position of the petitioner in this.

The same Circuit Court of Appeals in a later decision, *United States* v. *Vogue, Inc.*, 145 Fed. 2d 609, decided that seamstresses employed in a department store and paid compensation by the job less a commission to the store, were employees within the meaning of the Act. The Court went into an elaborate discussion of what constitutes the relationship of employer and employee under the Social Security Act, and while the facts in that case are considerably different than those in this case and the Court held that these workers in the department store were clearly employees, its opinion as to the reason for so holding is entirely in conflict with the opinion in the *Beard case* hereinafter referred to, in the 6th Circuit.

The Court of Appeals for the District of Columbia in the case upon which this petition is based appears to have followed the decision in the *Vogue* case rather than the *Yellow Cab* case and the *Beard* case hereinafter mentioned. The facts in the *Vogue* case are so entirely distinguishable from the case involved here that it is submitted that that case is not authority for the decision of the United States Court of Appeals in this case.

The case of *Glenn, Collector*, v. *Beard* in the 6th Circuit, 141 F. 2d 376, decided the question as to what constitutes the relationship of employer and employee in a case involving needleworkers making quilts and comforters at their homes on a job price basis. The decision in that case being entirely

in conflict with the Court's opinion in the *Vogue* case, supports the position taken by the petitioner in the case involved here and appears to be the more sound decision.

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

The case involves a question of general importance and a question of substance relating to the construction of the Social Security Act, which has not but should be settled by this Court, and on which there is a conflict between decisions of the 6th Circuit Court of Appeals and the 4th Circuit Court of Appeals.

RAYMOND J. GRACE, trading under the name and style of R. J. & M. C. Grace.

By LOWRY N. COE,
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